

香港特別行政區政府
The Government of the Hong Kong Special Administrative Region

政府總部
運輸及房屋局

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本局檔號 Our Ref. HDCR4-3/PH/1-10/0-1 Pt.10
來函檔號 Your Ref. LS/B/2/12-13

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8 February 2013

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LC Paper No. CB(1)561/12-13(01)

Dear Ms Cheng,

Stamp Duty (Amendment) Bill 2012

Thank you for your letter dated 1 February, asking the Administration to explain how the proposed section 63A of the Stamp Duty (Amendment) Bill 2012 reconciles with Article 73(3) of the Basic Law.

The proposed section 63A of the Bill seeks to provide that the Financial Secretary ("FS") may, by notice published in the Gazette, amend a percentage specified in the second column of head 1(1AA) (conveyance on sale chargeable with Special Stamp Duty ("SSD")), (1AAB) (conveyance on sale chargeable with Buyer's Stamp Duty ("BSD")), (1B) (agreement for sale chargeable with SSD) or (1C) (agreement for sale chargeable with BSD) in the First Schedule to the Stamp Duty Ordinance.

Article 73(3) of the Basic Law ("BL 73(3)") provides that the Legislative Council ("LegCo") of the HKSAR shall exercise the power and function to approve taxation and public expenditure.

The Administration has examined the issue carefully, and our views are set out in the ensuing paragraphs.

The Court of Final Appeal ("CFA") has laid down the purposive approach to constitutional interpretation in the case of *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 and *Director of Immigration v Chong Fung*

Yuen [2001] 2 HKLRD 533. Following the approach of constitutional interpretation laid down by the CFA in *Ng Ka Ling* and *Chong Fung Yuen*, it is important that BL 73(3) should be construed in the light of its context and purpose.

The purpose of BL 73(3) is to subject the taxation and public expenditure of the Government to the approval of the LegCo. Requirement of approval by the LegCo for taxation and public expenditure would clearly place the Government under the supervision of the LegCo financially.

As regards the context, it is appropriate to consider any relevant domestic legislation at the time of the adoption of the Basic Law on 4 April 1990. The Public Revenue Protection Ordinance (Cap. 120) (“PRPO”) is a piece of such domestic legislation. Section 2 of the PRPO provides that if the Chief Executive (“CE”) approves of the introduction into LegCo of a bill or resolution whereby, if such bill or resolution were to become law, any duty, tax, fee, rate, allowance, etc. would be imposed or granted, removed, or altered, he may make an order giving effect to the bill or resolution. An order made by the CE under section 2 of the PRPO comes into force immediately upon the signing by the CE unless otherwise specified and expires when the bill or resolution is passed, withdrawn, or rejected by the LegCo or, in any event, after four months from the day on which the order came into force (section 5).

The PRPO therefore delegates to the CE the power to give effect to what is merely a proposal of revenue legislation. An order made by the CE under section 2 is a subsidiary legislation subject to negative vetting. The PRPO, enacted in 1927, shows that there was already in existence domestic legislation whereby the Executive is delegated the power to make revenue legislation when the Basic Law was adopted in 1990.

The PRPO provides a relevant context of BL 73(3) in that the power of the LegCo to approve taxation and public expenditure may be exercised through the delegation to the Executive the power to make subsidiary legislation relating to taxation and public expenditure. We therefore consider that it is unlikely the intention of BL 73(3) to prohibit the delegation of the power to approve taxation and public expenditure by way of subsidiary legislation.

In the case of the proposed section 63A of the Bill, the proposal to enable the FS to amend the SSD and BSD rates by subsidiary legislation, if passed by the LegCo, will no doubt have the LegCo’s approval. We consider that while the SSD and BSD rates as amended by the FS may not have been specifically approved by the LegCo in advance, it does have the LegCo’s

approval in principle in that the SSD and BSD rates may be amended in the specified manner. Moreover, the subsidiary legislation made by the FS under proposed section 63A will be subject to the scrutiny by the LegCo under the negative vetting procedure.

In the light of the above, we consider that the proposed section 63A of the Bill is consistent with BL 73(3).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Vicki Kwok', with a small dot at the end of the signature.

(Mrs Vicki Kwok)

for Secretary for Transport and Housing